

**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW JERSEY**

IN RE: COMPLAINT OF ADRIAN CIVIL ACTION NUMBER:  
 AVENA AS OWNER AND AA  
 COMMERCIAL, LLC AS OWNER PRO 21-cv-00515-KMW-EAP  
 HAC VICE OF THE FISHING  
 VESSEL CONCH'RD, FOR Motion  
 EXONERATION FROM OR  
 LIMITATION OF LIABILITY

-----  
 KIMBERLY WOLFE, AS PERSONAL  
 REPRESENTATIVE OF THE ESTATE  
 OF AARON GREENBERG, AND ON  
 BEHALF OF KG, OVER WHOM  
 KIMBERLY WOLFE IS THE  
 APPOINTED CO-GUARDIAN, AND  
 WHO IS THE SURVIVING MINOR  
 CHILD OF THE DECEDENT, AARON  
 GREENBERG,

Third-Party Plaintiff,

v.

DANIEL J. AVENA, THE UNITED  
 STATES OF AMERICA, CM HAMMAR  
 AB and REVERE SURVIVAL,  
 INC.,

Third-Party Defendants.

-----  
 ADRIAN AVENA and AA  
 COMMERCIAL, LLC,  
 Third-Party Plaintiffs,

v.

CM HAMMAR AB and REVERE  
 SURVIVAL,  
 Third-Party Defendants.

Sharon Ricci, Official Court Reporter  
 sharon.ricci.usdcnj@gmail.com  
 267-249-8780

Proceedings recorded by mechanical stenography; transcript  
 produced by computer-aided transcription.

1 Mitchell H. Cohen Building & U.S. Courthouse  
2 4th & Cooper Streets  
3 Camden, New Jersey 08101  
4 November 2, 2022  
Commencing at 12:51 p.m.

5 **B E F O R E:**

**THE HONORABLE KAREN M. WILLIAMS,  
UNITED STATES DISTRICT JUDGE**

6 **A P P E A R A N C E S:**

7 REEVES McEWING, LLP  
8 BY: MARY REEVES, ESQUIRE  
9 1004 S. Front Street  
Philadelphia, PA 19147  
For the Plaintiffs Avena and AA Commercial

10 HOFMANN & SCHWEITZER  
11 BY: PAUL T. HOFMANN, ESQUIRE  
12 1130 Route 202 South, Suite A7  
Raritan, NJ 08869  
For the Plaintiff Wolfe

13 DEPARTMENT OF JUSTICE - CIVIL DIVISION, TORTS BRANCH  
14 AVIATION, SPACE & ADMIRALTY LITIGATION  
15 BY: BRADLEY J. PREAMBLE, ESQUIRE  
JARED HOOD, ESQUIRE  
16 P.O. Box 14271, CIV-T-ASA  
Washington, D.C. 20044  
For the Defendant United States of America

17 MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN  
18 BY: JAMELE A. HAMAD, ESQUIRE  
88 Pine Street, 21st Floor  
19 New York, NY 10005  
For the Defendant CM Hammar

20 CIPRIANI & WERNER, P.C.  
21 BY: MICHAEL D. NOBLETT, ESQUIRE  
485(E) Route 1 South, Suite 120  
22 Iselin, NJ 08830  
For the Defendant Revere

23 TESTA HECK TESTA & WHITE, P.A.  
24 BY: STEPHEN E. PARREY, ESQUIRE  
424 West Landis Avenue  
25 Vineland, NJ 08360  
For the Defendant Avena

1 (PROCEEDINGS held in open court before The Honorable  
2 Karen M. Williams, United States District Judge, at 12:51 p.m.)

3 THE COURTROOM DEPUTY: All rise.

4 THE COURT: Good afternoon. You can all be seated.

5 MS. REEVES: Good afternoon, Your Honor.

6 THE COURT: We're here this afternoon in the matter In  
7 Re Avena, 21-cv-515.

8 May I have appearances of counsel, please.

9 MS. REEVES: Counsel for the limitation plaintiff,  
10 Lisa Reeves, from Reeves McEwing.

11 THE COURT: I am sorry, say it again? Counsel for  
12 who?

13 MS. REEVES: The plaintiff, the limitation plaintiff,  
14 which is the vessel owner.

15 THE COURT: Okay.

16 MR. HOFMANN: Good afternoon, Your Honor, Paul Hofmann  
17 of Hofmann & Schweitzer. I represent the estate that's a  
18 claimant in the limitation proceeding and a third-party  
19 plaintiff against the various other defendants, including the  
20 United States.

21 MR. PREAMBLE: Good afternoon, Your Honor, Bradley  
22 Preamble on behalf of the United States as third-party  
23 defendant.

24 And with me here also is Mr. Jared Hood from the  
25 claims and litigation group at the United States Coast Guard.

1 MR. HAMAD: Good afternoon, Your Honor, Jay Hamad from  
2 Marshall Dennehey on behalf of CM Hammar, third-party  
3 defendant.

4 MR. NOBLETT: Good afternoon, Your Honor, Michael  
5 Noblett with Cipriani & Werner on behalf of Defendant Revere  
6 Survival.

7 MR. PARREY: And good afternoon, Your Honor, Stephen  
8 Parrey, the Law Offices of Testa Heck Testa & White, here on  
9 behalf of Defendant Daniel Avena.

10 THE COURT: Thank you. We're here this afternoon for  
11 two motions. The first I want to address is the motion to  
12 dismiss filed on behalf of the government.

13 I'm not sure who wants to take that argument. We'll  
14 start there. Your motion.

15 MR. PREAMBLE: Thank you, Your Honor.

16 May I use the podium, please?

17 THE COURT: Yes, you may.

18 MR. PREAMBLE: May I proceed?

19 THE COURT: Yes, please.

20 MR. PREAMBLE: Good morning, Your Honor.

21 The United States has filed a motion to dismiss in  
22 this case which we are here today for oral argument. And as a  
23 matter of formality first, the United States, if the Court  
24 finds it necessary to make the request to reserve any time for  
25 rebuttal after the other parties have had an opportunity to

1 make their arguments.

2 THE COURT: Sure.

3 MR. PREAMBLE: Thank you.

4 The United States has presented both an opening brief  
5 and a reply brief that addresses a great deal of the arguments,  
6 and I'm sure the Court is prepared on that, so I'd like to just  
7 jump in and address a point that really wasn't covered as well  
8 in the briefs, and that is whether or not the discretionary  
9 function exception applies to one of the allegations that have  
10 been set forth by the plaintiffs.

11 And that allegation is essentially the failure of the  
12 Coast Guard to accurately and timely pass information  
13 internally among Coast Guard personnel. The limitation -- the  
14 Plaintiff Kimberly Wolfe in this case has alleged that if the  
15 vessel named CONCH'RD was communicated to the Coast Guard on  
16 the first call from father, Daniel Avena, that the Coast Guard  
17 mismanaged that information and did not timely pass it along to  
18 its other internal stations, including sector Delaware Bay, and  
19 that delayed the rescue.

20 The question is, is that conduct also covered by the  
21 discretionary function exception? And the answer is yes, it  
22 is. That conduct, as the Court is aware of, in the test under  
23 *Gaubert* would be -- the United States would assert that the  
24 challenged conduct there would be the duty to accurately and  
25 timely pass information internally amongst Coast Guard

1 personnel.

2           Is there a mandatory duty on a part of the Coast Guard  
3 that they have undertaken to do that, to pass that information  
4 timely and accurately? And the answer is no. And that's true  
5 both on the face of the complaint. The plaintiffs have not  
6 alleged that the Coast Guard policies, statutes, regulations,  
7 or procedures compelled its employees to timely and accurately  
8 pass essentially all information they may receive during the  
9 collection or information-gathering stage.

10           So going on to Step 2 of that analysis, is this  
11 untimely inpassing of information susceptible to policy  
12 analysis? And the answer there is, first, as *Gaubert* lays out,  
13 first of all, the United States is entitled to a presumption  
14 that it is susceptible to policy analysis.

15           Second of all, the plaintiffs have not alleged in  
16 their complaint that their allegation of failure to timely pass  
17 information was not susceptible to policy analysis at all. So  
18 really on its face of the complaint, the plaintiffs have not  
19 alleged sufficient facts to establish subject-matter  
20 jurisdiction in this case, not only for the issue of failure to  
21 pass timely information internally, but of course, as was laid  
22 out well in the briefs, as other courts have found repeatedly,  
23 the issue of deploying an asset such as a helicopter or boat or  
24 any other type of search and rescue asset to rescue somebody is  
25 just something that is also covered by the discretionary

1 function analysis.

2 And there have been several cases on this point that  
3 have laid out clearly why that's so, and the briefs have laid  
4 that out as well. And unless the Court has any questions on  
5 that particular aspect, I would simply be fine with moving on  
6 to other points.

7 THE COURT: So I don't have any questions on this. I  
8 think the appropriate way to proceed on this oral argument is  
9 on motion to dismiss for lack of jurisdiction, because if I  
10 don't have jurisdiction, there's no point in reaching anything  
11 else.

12 And so if you have any other points to be made about  
13 whether or not, as I understand it, the Court lacks  
14 jurisdiction because a claim of this nature could not be  
15 maintained against a private party or because of discretionary  
16 function, then I'm satisfied with the papers and your  
17 additional argument this afternoon.

18 MR. PREAMBLE: Okay. Thank you.

19 And Judge Williams, if I may just make one  
20 clarification that I wanted to be sure to address with the  
21 Court, and that would be with respect to futility.

22 And that answer would be yes, this is futile. It is  
23 futile because not that there are facts here that they get a  
24 chance to replead, okay. What's bound here -- what binds the  
25 plaintiffs in a discretionary function analysis is whether or

1 not there is a mandatory course of conduct that these Coast  
2 Guard personnel were required to follow, and the answer to that  
3 question is, for both of these allegations, no.

4 And so the United States would just conclude the  
5 opening argument by asking the Court to dismiss this complaint  
6 with prejudice.

7 Thank you.

8 THE COURT: Thank you. All right. Who would like to  
9 be heard first?

10 I have opposition from both, on behalf of Ms. Wolfe  
11 and on behalf of Avena.

12 MR. HOFMANN: Your Honor, Paul Hofmann on behalf of  
13 Wolfe.

14 I'm sure Ms. Reeves has something else that she'll  
15 probably clean up on certain points that I make, and of course,  
16 she should have the opportunity to speak to you as well.

17 It seems to me from what Mr. Preamble has now said,  
18 the government is all but, to my mind, conceding that their  
19 motion here is premature except for a question of law, could  
20 what the government failed to do and screwed up doing be  
21 considered within discretionary function test?

22 Now, it's almost shocking to me that the government is  
23 now -- is sort of saying here, from what he just said, that if  
24 a member of the Coast Guard negligently or maybe even  
25 intentionally failed to provide appropriate information

1 provided to them, that that could be considered a discretionary  
2 act, and that there is some sort of public policy that would  
3 protect a potentially gross misconduct on their part, gross  
4 negligence.

5 One of the allegations here is Daniel Avena was spoken  
6 to by the Coast Guard and said, look, that EPIRB that just went  
7 off, it's not on the Gold Rush II, it's on my son's other boat,  
8 the CONCH'RD, and they're fishing right off of here in Cape  
9 May, please go rescue them.

10 But what does the Coast Guard do for the next half  
11 hour? It keeps broadcasting that it was on the Gold Rush II,  
12 and that's in the -- that's in the pleadings.

13 Now, I've heard Mr. Preamble say that the pleadings  
14 are not specific under the *Iqbal* test and, quite frankly, we  
15 have laid out a specific timeline and described how and why the  
16 government's response, the Coast Guard's response, failed.  
17 Yeah, I didn't put in the word "Good Samaritan." It's almost  
18 as if those talismanic words need to be put into a complaint,  
19 but they aren't.

20 We allege negligence. And negligence implies and  
21 infers and incorporates duty and a breach of duty, and that's  
22 what we said occurred here.

23 As to his point as to whether there was a mandatory  
24 violation, we put in -- and Your Honor has it as the search and  
25 rescue addendum. And if we go to that document, as we

1 described in our papers, there is language that the Coast Guard  
2 itself says.

3           There's policy, which could be protected, and then  
4 there's mandatory actions which have to be followed. And  
5 that's at the -- at page IV -- IV, Roman numeral IV, I believe,  
6 of the document. And it says, "Notice to readers." And here  
7 it says, by -- it talks about, first, what is the hallmark of  
8 policy, which we would agree a policy decision is something  
9 that, under the discretionary function, could be protected.  
10 But then it says, "By comparison --," and I quote, "-- the  
11 hallmark of doctrine is the use of the terms 'can' and 'may.'  
12 They are permissive terms. The term 'should' is a mandatory  
13 term unless justifiable reason exists for not complying."

14           It says, "The hallmark of policy is the use of terms  
15 'must' and 'shall.' These are mandatory terms."

16           Now, we have shown within the SAR that there are  
17 mandatory actions that should have been taken upon the EPIRB  
18 first going off, and one of those is contained in rule -- and  
19 I -- to get it correct, I will state, it's 4.1.2 (b)(2), I  
20 believe it is, Your Honor, off the top of my head. It's in the  
21 document we submitted to Your Honor.

22           Counsel for the government doesn't even address that  
23 issue. He simply says, oh, the whole thing is not mandatory,  
24 but the Coast Guard itself says this is mandatory, you shall  
25 send out suitable aircraft upon receiving an EPIRB distress

1 signal.

2 And what is a distress signal? Any signal that comes  
3 from an EPIRB beak, and unless there's reason not to believe  
4 that it was a distress signal.

5 So the argument that there's no mandatory rule flies  
6 in the face of the case law that -- even as cited by the  
7 government, that if there's a statute, rule, or regulation that  
8 states that it's a mandatory function, then it has to be  
9 followed. They didn't do it here.

10 So we've got violations in two -- in three different  
11 ways. I've pointed out one where Mr. Preamble says, well,  
12 maybe the internal communication among the Coast Guard, that's  
13 a discretionary function. Well, I hope that the Court wouldn't  
14 buy that argument. And the second is, they've failed to  
15 provide the correct information for a half hour. And the third  
16 thing is, the distress signal was out and they failed to follow  
17 their own rules that are mandatory.

18 Now, the fourth thing is, what we point out, is this  
19 whole process of giving the wrong information -- and there's  
20 case law, and one of the cases we cited to the Court is this  
21 case from the -- I believe it is out of the Sixth Circuit, but  
22 it's the *Gavagan* case. And there's also the *Patentas* case  
23 where actions by the Coast Guard, in and of themselves, which  
24 are detrimentally relied on, could have affected the  
25 possibility of the injured person being saved, could be found

1 to be a violation.

2 And in this case, we give specific facts. And I can  
3 represent to the Court, I have spoken to the witnesses, who  
4 have specific knowledge that they -- that the broadcast that it  
5 was the Gold Rush II did not alert them to the fact that the  
6 CONCH'RD was the vessel in distress, and that they were out  
7 fishing and they saw the CONCH'RD not far from where they were  
8 fishing; and if, in fact, the broadcast that had been made had  
9 said that it was the CONCH'RD that was in distress, they would  
10 have gone to the rescue. They knew the people on the boat.

11 This is questions of fact, Judge. Here we are, we  
12 haven't even started discovery, except for Rule 26 disclosures,  
13 most of which are just, you know, vague and unresponsive, and  
14 there's a lot to be found out here.

15 Now, it may turn out that the allegations we've made  
16 do not rise to the level, but at this point, here on a Rule 12  
17 motion, there's so much that is alleged that we believe Your  
18 Honor should deny the motion and order us to proceed with  
19 discovery.

20 THE COURT: The policy that you attach, isn't there a  
21 prescription on that policy and doesn't it -- the Coast Guard's  
22 addendum search and rescue policy, in and of itself, in the  
23 document itself, it reserves the discretion that is inure to  
24 this entity.

25 And so I understand and I have read these papers

1 closely, and I understand that you have pulled out language  
2 from the policy to support your argument. My reading, though,  
3 leads me to the conclusion that you have excluded the  
4 prescription that is attendant to that policy, which is, this  
5 is all subject to the discretion that inures to the benefit of  
6 this organization.

7 I call it organization, but government.

8 MR. HOFMANN: I understand what you're saying. You're  
9 talking about the Coast Guard.

10 I have to -- Your Honor, to -- essentially then when  
11 it comes to anything that is done by the Coast Guard, based on  
12 that reading, that because they say in one -- on one page they  
13 say, oh, this is just policy, we're protected, and on another  
14 page they say, this is what you shall do, I don't think that it  
15 would be -- is appropriate for you as a decisionmaker to say  
16 that one statement overrules another statement.

17 I think that you have to look at -- that you have to  
18 look at the trees as well as the forest in this case.

19 THE COURT: It's more than that, though, right? They  
20 have to -- in order for the government to agree to be sued,  
21 give up their right to sovereign immunity, it has to be done  
22 expressly.

23 And in doing that, in reaching that conclusion, I have  
24 to look at a lot of things, and one of the things is in its  
25 totality. Correct?

1           And so we have here the Coast Guard agency -- I don't  
2 know what you call it. Department, maritime company.

3           MR. HOFMANN: It's part of the Homeland Security now.

4           THE COURT: Homeland Security. Thank you.

5           We have the Coast Guard who is tasked with a number of  
6 things, not just search and rescue. Right? They have -- it's  
7 an organization.

8           And as an organization, it has to give guidelines and  
9 guidance as to how the members of that organization, the crew,  
10 the staff, the people in the boat, the people in the  
11 helicopter, all the people who work for the Coast Guard, are to  
12 conduct themselves in certain circumstances.

13           Explain to me how that guideline, those practices,  
14 those policies and procedures transition to, oh, you can sue  
15 me? Because that's what you're talking about, they've given up  
16 their sovereign immunity by virtue of the addendum to the  
17 policy. That's what I need to be convinced of.

18           MR. HOFMANN: Well, Your Honor, first of all, the  
19 jurisdictional grant doesn't come from the search and rescue  
20 addendum; the jurisdiction comes from the Suits in Admiralty  
21 Act and the Public Vessels Act.

22           So there's the federal jurisdiction against this  
23 entity. And --

24           THE COURT: So but we're talking about the  
25 discretionary function, right?

1 MR. HOFMANN: Right.

2 THE COURT: In order for the motion to dismiss to  
3 prevail on the jurisdictional issue, my understanding is that,  
4 number one, this action could not be maintained against the  
5 private entity. Right? That's the first thing.

6 And number two, that the discretionary function  
7 exception doesn't apply. So there's no duty. Right? That the  
8 Coast Guard's decisions about whether, when, or how to  
9 undertake the rescue are discretionary policy.

10 If they have those two things, then sovereign  
11 immunity, they're entitled to sovereign immunity. And your  
12 argument, as I understood it from my reading of the papers,  
13 your argument is, well, no, the discretionary function  
14 exception doesn't apply, because you have in the opposition  
15 papers attached the addendum search and rescue policy.

16 MR. HOFMANN: If I may, Your Honor, because you raised  
17 a couple things there that I think need to be addressed, and  
18 the first is this issue about could a -- could the government  
19 be sued for something that a private -- that a private  
20 individual could not be sued for?

21 And that goes to the concept of the Good Samaritan  
22 rule, which, in this case, is definitely applicable in that  
23 once you undertake the rescue, okay, then that might bring in  
24 the discretionary function. But once you undertake the rescue,  
25 you have to do it in a non-negligent way.

1           And that comes straight out of the case law and also  
2 out of the restatement.

3           THE COURT: So what is it you propose that I determine  
4 that they undertook the rescue?

5           MR. HOFMANN: I think that the SAR itself gives you a  
6 clue, and that is certainly -- and I think that Mr. Preamble's  
7 arguments in his papers conflate the issue of information  
8 gathering versus information dissemination.

9           The SAR, and we point it out in our brief, says that  
10 once that information is obtained, you shall broadcast -- and  
11 that's in -- if you give me a second, I could find that  
12 provision. It says, you shall broadcast. It doesn't say you  
13 may broadcast or use your discretion if you want to broadcast.  
14 It says, if it's in distress, you shall broadcast.

15           So there are rules -- and this -- and yes, this unit's  
16 design and their function is to do searches and rescues, this  
17 part of the Coast Guard. Maybe there's other parts that deal  
18 with water pollution, but we're not dealing with that section.

19           We're talking about the people who are tasked in this  
20 area to do searches and rescues. And the rules that they have  
21 say once you have that information, you shall broadcast. That,  
22 to me, is what you should find is the beginning of the search  
23 and rescue that occurred here.

24           And once they started that, they have to do it  
25 non-negligently. So once that private Good Samaritan says I'm

1 going out there, I'm taking my boat out there, and if he runs  
2 over a person in the water, that person is then liable to be  
3 sued. If he had chosen not to go out, he can't be sued.

4 But here, the government followed its rules, and its  
5 rules say once you have that information, that's the beginning  
6 of the search and rescue.

7 So I hope I've answered your question at least as to  
8 our position as to when it commenced. And the government, as I  
9 said, conflates, and they were trying to make you think, oh, we  
10 were gathering information. When they're broadcasting the  
11 wrong boat name for a half hour and purportedly even having  
12 been told that that's not the name of the boat?

13 That's not to me discretion, and I think that at that  
14 point, Your Honor, at least for purposes of ferreting out the  
15 information, you should deny the motion. Maybe not to the  
16 point where they could not ever remake it, of course, but at  
17 this point, there's too much out there that I believe we have  
18 presented to you to say deny the motion, let's get discovery,  
19 let's see what all the facts were.

20 THE COURT: To reconcile your position with two cases,  
21 *Matter of Moore*, 488 F. Supp. 231, and *Azille vs. United*  
22 *States*, DVI November 13 -- I am sorry, 2008 Westlaw 4911205.  
23 The reason I ask you to reconcile those two cases with your  
24 argument is those two cases both hold that this SAR, that  
25 you're relying on, does not destroy the discretionary function

1 exception.

2 MR. HOFMANN: Having looked at those cases a while ago  
3 when we briefed them, my take on them was that the Court said  
4 the SAR does not -- you can't rely on it because the plaintiffs  
5 or the claimants in those cases did not specifically point to  
6 any provisions within the SAR that might apply to the specific  
7 facts of the case, and whereas we did the task of reading every  
8 provision specifically related to this failed search and rescue  
9 and we believe that that's why those cases are distinguishable,  
10 Your Honor.

11 THE COURT: Thank you.

12 MS. REEVES: May I address the Court for the  
13 plaintiff?

14 THE COURT: You may.

15 MS. REEVES: Thank you. And I'll just stay here, if  
16 you don't mind?

17 THE COURT: Wherever you feel comfortable.

18 MS. REEVES: To address the discretionary function  
19 issue and the jurisdiction, I think Your Honor hit the nail on  
20 the head about the communications as to when did the search and  
21 rescue undertaken efforts by the Coast Guard begin?

22 Was it the first boat send out? Is it the first  
23 urgent marine broadcast?

24 THE COURT: Before we go too far down this path, I  
25 think the discretionary function exception applies to when,

1 where, how, whatever they do in this process, so I don't want  
2 to parse out because I say "when." The question is really one  
3 of inquiry. When do you think this happened?

4 I don't know if it's of any moment. Because if the  
5 entire process is protected, does the when even matter?  
6 Because I think you're about to argue to me about when as  
7 though it's dispositive of this issue, and I don't think it is.

8 I think that the discretionary function exception --  
9 and perhaps I am reading this far too broadly or narrowly for  
10 your liking, for your arguments really, but I read this as  
11 giving up a fair amount of discretion to these agencies.

12 And I say "to these agencies" because the Coast Guard  
13 is not the only agency I deal with in federal court. So -- I  
14 always -- you know, sometimes forget which agency is it, but  
15 this is the Coast Guard.

16 I read this as being a big hurdle to overcome in a  
17 matter like this. And I'm not alone. I've read a lot of cases  
18 to tell me that I'm not alone in my interpretation of this  
19 particular principle.

20 MS. REEVES: Well, if I could respond, Your Honor.  
21 With all due respect, we all agree that the Coast Guard has  
22 absolutely no duty to search for anyone or rescue anyone, none.  
23 They could sit in their Coast Guard cutter and watch someone  
24 drown in front of them. It might not be nice --

25 THE COURT: Well --

1 MS. REEVES: -- but it's not actionable.

2 THE COURT: Well, I wouldn't say that.

3 MS. REEVES: No, they wouldn't, but honestly there  
4 would be no liability if they didn't try to help the person.  
5 That's what the law says.

6 However, the discretionary function says it's  
7 discretionary to decide whether or not they're going to attempt  
8 to search and rescue. But once they start the process and  
9 decide to do a search and rescue, they have to do so with  
10 reasonable care.

11 That's *Matthews*, that's *Indian Towing*, that's *Albinder*  
12 -- I'm not sure I'm pronouncing it very well -- and I can, you  
13 know, give you the cites, if you'd like. These are all in the  
14 briefs. *Kerowski* (PH). And there's numerous cases, Your Honor,  
15 where the government's liability during a search and rescue  
16 isn't limited to dropping the victim out of the helicopter or  
17 running him over with a boat, it's also if there's negligence  
18 in the process of search and rescue that worsens the victim's  
19 position, then there is liability. And I mean, there's a lot  
20 of cases on this, Your Honor.

21 And I'm not going to tell you when the search and  
22 rescue was launched, whether it started with the communications  
23 or not, because that is a question of fact. And there's case  
24 law throughout saying that it's a question of fact.

25 There's *Hurd vs. The United States* out of the --

1 THE COURT: Tell me why *Hurd* differs from this case.

2 MS. REEVES: Why it differs?

3 THE COURT: Why it differs.

4 Did you find anything in *Hurd* that differs from the  
5 facts -- and again, here we're in the pleadings stage, I get  
6 that.

7 What's the difference with *Hurd* and this case?

8 MS. REEVES: Well, in *Hurd*, the Coast Guard was liable  
9 because during the search and rescue they terminated the search  
10 too early, before sunrise, and that worsened the position of  
11 the people in the shipwrecked boat and they were found -- the  
12 United States, the government was found liable.

13 And that was, again, out of the -- well, you know it.  
14 It's from the --

15 THE COURT: So is it the undertaking -- the Coast  
16 Guard -- see, this is my issue here. I think it's  
17 undisputed -- let me get these facts correct.

18 There's a conversation between Coast Guard and --  
19 because I can't get the name straight.

20 MS. REEVES: Daniel Avena.

21 THE COURT: I'm going to say "dad."

22 MS. REEVES: Dad.

23 MR. HOFMANN: Okay.

24 THE COURT: The conversation between the Coast Guard  
25 and dad. Right?

1 MS. REEVES: Correct.

2 THE COURT: There's a dispute about whether or not the  
3 device and the location of the device is identified as being on  
4 the CONCH'RD or the Gold Rush. Right? There's a dispute about  
5 that.

6 MS. REEVES: The -- well, not really. The EPIRB, the  
7 device, was registered to the Gold Rush, a pleasure vessel that  
8 was owned by dad.

9 THE COURT: Okay.

10 MS. REEVES: As soon as it went off and the Coast  
11 Guard got the signal, I believe it was the Coast Guard, they  
12 called Mr. Avena -- right? -- because there's a phone number  
13 with the registration.

14 It's our position that Mr. Avena will -- Daniel Avena,  
15 dad, will testify, I told him -- they said, is it a false  
16 alarm? No, he said, that is on my son's CONCH boat, and he's  
17 fishing right now, this is not an alert, he's in trouble.

18 That is, you know, our position. It's a fact  
19 question.

20 THE COURT: But it's -- isn't the device on the wrong  
21 boat and that's undisputed?

22 MS. REEVES: Correct.

23 THE COURT: That EPIRB is registered to the Gold Rush.

24 MS. REEVES: Correct.

25 But if Mr. Avena, as we contend, Daniel -- dad, I'll

1 say "dad." If dad -- the device goes off, the Coast Guard gets  
2 the signal, they call dad because they have the registration  
3 stuff. And dad says, no, it's not on my boat, the Gold Rush,  
4 it's on the CONCH'RD, my son's CONCH boat, and he's out at Five  
5 Fathoms, which is a known location -- I couldn't find it, but  
6 apparently among fisherman -- off of Cape May, he's out there  
7 and he must be in trouble. So the first part is irrelevant in  
8 my mind.

9 THE COURT: That's the dispute, perhaps, right?

10 MS. REEVES: Right.

11 THE COURT: This is the dispute, Coast Guard saying  
12 they didn't say it was on the CONCH'RD, he never said anything  
13 to me about which boat it was on, and we have it registered to  
14 the Gold Rush and that's the -- that's what we did. Right? So  
15 that's the dispute of fact.

16 MS. REEVES: But they eventually changed it to the  
17 CONCH'RD.

18 THE COURT: Because there's a second conversation. As  
19 I understand the pleadings and the facts in this case, there's  
20 a second conversation with dad.

21 MS. REEVES: But those are facts.

22 THE COURT: Are they in dispute --

23 MS. REEVES: Yes.

24 THE COURT: Are they part of the pleadings right now?

25 MS. REEVES: No, Your Honor. We don't say there was a

1 second conversation and he didn't say -- the CONCH'RD and the  
2 first one. You have to accept all our -- with respect, you  
3 have to accept the claimant's third-party complaint facts as  
4 true and you have to accept our -- the plaintiff's facts as  
5 true in our cross-claim.

6 And, you know, there's facts all over --

7 THE COURT: What is the import? Just because there's  
8 a dispute in fact does not relegate this motion to be denied.  
9 Motions to dismiss at the pleading stage are rare, I understand  
10 it. I totally embrace that. I very rarely do them myself.

11 But in this case, given the breadth of sovereign  
12 immunity, is this the case, with even these facts, that the  
13 motion to dismiss should be denied? Because the facts that  
14 you're pointing to I don't know change anything about the  
15 analysis as to whether or not there's subject-matter  
16 jurisdiction.

17 That's the mental gymnastics I'm doing with this.  
18 Because I understand there's a factual dispute. I don't know  
19 that that matters when the Court is required to first determine  
20 whether or not there's subject-matter jurisdiction. And the  
21 bases for subject-matter jurisdiction don't necessarily rise  
22 and fall on either of these conversations or one conversation  
23 or both conversations.

24 Those -- it covers them, Coast Guard, for these very  
25 types of situations where they are contacted, or not, to

1 conduct a search and rescue. At its core, that's what this  
2 case is about.

3 And don't for a minute think it's lost on me that a  
4 life was lost here. I get that completely. Put that aside for  
5 a minute.

6 Who's responsible? Because that's what we're talking  
7 about. And in order for the Coast Guard to be responsible for  
8 that, you've got to give me why I have subject-matter  
9 jurisdiction. And if your sole basis for that are these phone  
10 calls or this phone call or these pleadings, I'm not certain --  
11 I've not been convinced thus far that you've met that standard.

12 Because the entire thing is search and rescue. It is  
13 the very thing that divests this Court of subject-matter  
14 jurisdiction.

15 MS. REEVES: Your Honor, there are multitudes of cases  
16 where Coast Guard made a mistake in communications internally  
17 and to the public or other people during a search and rescue  
18 and was an -- either led to liability or it didn't, but it was  
19 an issue of fact.

20 THE COURT: During the search and rescue.

21 MS. REEVES: Yes.

22 THE COURT: I don't know that this happens during the  
23 search and rescue.

24 MS. REEVES: Well, if I could, Your Honor, there are  
25 also multiple cases, including *Hurd vs. The United States*,

1 where it says whether the Coast Guard has attempted or started  
2 the search and rescue is a matter of fact. And that's the  
3 appellate decision.

4 But the underlying decision that was affirmed, here is  
5 the -- one of the findings of fact of the judge, because it was  
6 a bench trial, of course: After a trial gathering information  
7 is part of the SAR process. A Coast Guard rescue involves more  
8 than simply putting a boat in the water. Aiding someone in  
9 distress is a continuum. It has a beginning, a middle, and the  
10 end. It's an evolving process. The first step is gathering  
11 information, evaluating it, and finally, deciding the  
12 appropriate resource, et cetera, et cetera.

13 Based on that judge's, in the District of Ohio, I  
14 think, finding of fact in that case, he found that, indeed, the  
15 search and rescue started with the communications -- *Hurd* was  
16 all about miscommunications, as I recall -- not *Hurd* wasn't.  
17 But the other case that I can never pronounce, *U.S. vs.*  
18 *Gavagan*, out of the Fifth Circuit, it's the same -- it's  
19 incredibly similar that the improper, you know, communications  
20 caused other mariners and vessel owners to stand down, thinking  
21 the vessel was safe, and therefore, there was liability on the  
22 Coast Guard there.

23 That's -- this would be my whole argument, Your Honor,  
24 not based on the SAR manual, but I think we all agree -- the  
25 Coast Guard agrees that once they initiate a rescue response,

1 they have to do it with reasonable care.

2 When the search and rescue was launched is a question  
3 of fact. That's *Hurd*, that's *Sandra & Dennis Fisheries*,  
4 *Deravin*, the case I just mentioned, *Gavagan*, the *Turner* case.  
5 And, in fact, all of the cases that the -- most of. I  
6 shouldn't say that. And it's in my brief.

7 The cases relied on by the United States in their  
8 brief were decisions of the district court after a bench trial,  
9 during which facts were determined, or on summary judgment,  
10 after the close of discovery. That's *Turner*, that's *Sagan*,  
11 that's *Bunting*, that's *Sandra & Dennis Fishing Corp* and  
12 *Albinder*.

13 It's -- you know, I think that in this case this is  
14 premature. You know, perhaps we should revise our pleadings to  
15 put the magic words in, but the issue of jurisdiction is  
16 totally intertwined with the issues under the Good Samaritan  
17 Doctrine.

18 And the last point, Your Honor, is a private party  
19 would be liable for these actions. A private party,  
20 Tow-Boats-R-Us, or even just a regular Good Samaritan not  
21 looking for profit, if he learns that there -- I don't care how  
22 he learned, from the EPIRB or from a phone conversation, that  
23 it's the CONCH'RD, go get the CONCH'RD, Tow-Boat-R-Us. It's  
24 the CONCH'RD, we first thought it was another one, and it's out  
25 by Fathom Banks. And he says, yes, I'm going, I've got it,

1 don't worry about it.

2 And then if he tells his co-workers on a different  
3 boat to go somewhere else or he's the guy in the office, and  
4 the people die and nobody else has gone, they're liable, just  
5 like the government should be liable here.

6 THE COURT: Thank you.

7 No one else needs to be heard, right? No one else  
8 even chimed in on the papers.

9 MR. HOFMANN: All I'd like to point out, Your Honor,  
10 is on page 4-10 -- and it just goes to --

11 THE COURT: What are you referring to?

12 MR. HOFMANN: Of the SAR. When did the search and  
13 rescue commence? There's a block in bold that says, "Note, as  
14 mentioned in 4.1.61, if a case is classified as distressed, the  
15 Coast Guard shall respond immediately, if able, to include  
16 broadcasting a UMIB and dispatching appropriate resources."

17 They didn't have the right, once they determined this  
18 was a vessel in distress, to screw up, they didn't -- they  
19 issued --

20 THE COURT: But isn't -- I'm with you.

21 MR. HOFMANN: Okay.

22 THE COURT: Except this argument factually is ignoring  
23 the device is on the wrong boat. And that doesn't matter in  
24 this analysis at all?

25 MR. HOFMANN: You're assuming that the device is on

1 the wrong boat, but it's not necessarily true. It may have  
2 been on the correct boat, as was told to the Coast Guard.  
3 That's what Ms. Reeves is trying to -- well, not trying to say  
4 that she didn't express it, but the point is, she was pointing  
5 out to you that it is intertwined.

6 If Mr. Avena, whose counsel is here, did say to the  
7 Coast Guard on that first call, it's on the CONCH'RD, they're  
8 fishing at the 40-fathom line, it's right off of Cape May,  
9 please help, and the Coast Guard said we got it, we got it,  
10 we're going to broadcast, we're going to go save those people.  
11 They issue the broadcast that said the wrong boat.

12 Now, if that's not violating the rule that if a vessel  
13 is in distress you're going to issue a broadcast and send  
14 appropriate resources, including the other section I said,  
15 which says, in a vessel in distress and you're not exactly sure  
16 where it is, send a helicopter or airplane, some sort of flying  
17 asset.

18 These are mandatory things that they're supposed to  
19 do. That's their function. That's not their discretion  
20 anymore if their rules say do this. And if they do it in the  
21 wrong way, they harmed and, respectfully, 30 minutes, we  
22 believe, at least, were lost by them screwing around with the  
23 wrong boat. And if they had gotten out there, they could have  
24 dropped a life preserver to my client's decedent and we  
25 wouldn't be here today.

1 Thank you, Your Honor. I --

2 THE COURT: Mr. Preamble?

3 MR. PREAMBLE: May I use the podium?

4 THE COURT: Yes.

5 MR. PREAMBLE: Briefly. Very briefly. This is more  
6 for just clarification. I understand the Court gets this. And  
7 there are a couple things I want to address to be sure that we  
8 have the correct analysis here.

9 The first is, the Supreme Court has made this clear  
10 numerous times when it has addressed discretionary function  
11 that it is not the status of the actor, it's the conduct that  
12 we're looking at.

13 So there's discussion here about, well, discretionary  
14 function doesn't apply anymore once the search and rescue's  
15 underway. That's not true. That's not true. It applies the  
16 entire time.

17 The question, as the Supreme Court laid out, is, is  
18 the conduct susceptible to policy analysis? Is there elements  
19 of judgment or choice that are involved here? It doesn't  
20 matter what the nature of the actor is, whether it's an  
21 operational actor versus a policy planner actor. The Supreme  
22 Court got rid of that distinction a long time ago.

23 Second, there's a lot of discussion about undertaking,  
24 Good Samaritan. It doesn't matter. When the Court is looking  
25 at the discretionary function analysis, the negligence, duty,

1 Good Samaritan reliance, all the rest of it, it doesn't matter.  
2 Discretionary function test, as articulated in  
3 *Gaubert*, is a hypothetical question that the Court has to  
4 address. What's the challenged conduct? Is there a mandatory  
5 duty? If there's not, is the conduct susceptible to policy  
6 analysis? The end.

7 The Court is right, that the policy has a huge  
8 disclaimer on it. In the *Matter of Moore*, Judge Grimm  
9 understood that. But even if that disclaimer was not there,  
10 the very provisions that plaintiffs, the non-movants, have  
11 cited throughout their response brief have language that is  
12 qualified and indicative of an application of judgment.

13 4.1.5.1, immediate response shall be initiated if  
14 feasible. That is something that speaks to judgment.

15 Number 2: 4.1.6.1, the SMC shall take action  
16 appropriate to the situation.

17 4.1.6.2, respond immediately, if able.

18 Somebody at the Coast Guard has to make a decision and  
19 a judgment if they're able to.

20 Suitable aircraft, 3-4-4-2, bravo. Suitable aircraft  
21 should be launched. That is not must be launched.

22 So even if you look at the challenged conduct and if  
23 we were to say that this overarching policy, which the Coast  
24 Guard and Judge Grimm has noted in *Matter of Moore*, even if  
25 that didn't exist, the provision cited by the non-movants here

1 just simply are not mandatory. So I wanted to make that point.

2 And then -- so there's just a lot of confusion going  
3 on here with the non-movants about negligence and DF. Two  
4 different things, two separate questions.

5 And no, the Court does not need to decide when an  
6 undertaking occurred here. It's irrelevant to the analysis.

7 And just briefly, if I look over my notes, I think  
8 that's all I have to say.

9 And just to answer the question about *Hurd*, my  
10 understanding, just quickly reviewing that decision from the  
11 Fourth Circuit, there are cases where the United States did not  
12 raise the discretionary function exception. I can't speak to  
13 that. But that's one difference, at least with the circuit  
14 opinion.

15 And the *Gavagan* case, it's an early case from the  
16 1960's, which again, we're not privy to, and I don't think that  
17 opinion really addresses what the policies and procedures were  
18 in play there. And I do not believe, if I remember correctly,  
19 the United States raised the discretionary function exception  
20 in that case either, and in part because, most likely, in 1960,  
21 the discretionary function law just hadn't developed to the  
22 point it has now.

23 So again, unless the Court has any further questions  
24 from the United States, we would just simply ask again for  
25 dismissal with prejudice.

1 THE COURT: Thank you.

2 MS. REEVES: Could I make one request, Your Honor?

3 THE COURT: Sure.

4 MS. REEVES: I'm looking again at the U.S.'s brief.

5 And it was based on --

6 THE COURT: On Document 58?

7 MS. REEVES: Document 58.

8 As noted, claimant's theory of liability relate only  
9 to Coast Guard conduct before it undertook the rescue, et  
10 cetera. And, you know, we addressed that by saying, no, they'd  
11 already undertaken it.

12 The point is, this is the first time that I'm hearing  
13 it articulated that the whole search and rescue process is a  
14 matter of policy. I think the case law belies that. But if  
15 that -- that's obviously a focus here for this argument, and  
16 I'd like a chance to address it because it really -- their  
17 whole argument before was, well, he was dead before we put a  
18 boat in the water and that's when it started, and so all this  
19 other stuff doesn't matter, but now I'm hearing every decision  
20 they make -- you know, to make a broadcast is or is not, you  
21 know, policy -- and I know there's law on this.

22 Whether or not it's a policy judgment I think is an  
23 issue of fact, Your Honor. And I'm happy to submit law on it.

24 THE COURT: So this -- there is some traction to this,  
25 whether or not it's an issue of fact. Right? I do understand

1 that argument. I probably understand it too keenly because  
2 this is why granting motions to dismiss are rare.

3 Because I have rarely encountered the argument where,  
4 oh, additional facts, if discovered, could dictate the outcome  
5 of this issue. Right? I mean, that's really what you're  
6 arguing -- right? -- there are facts out there that we can get,  
7 that we can discover, that shows or helps us establish our  
8 cause of action against the Coast Guard. Yes. Always.

9 The problem is, those facts, as I'm understanding this  
10 process in the pleading, don't get me to the answer that I need  
11 to get to with respect to the discretionary function. That's  
12 the problem.

13 And I will tell you, I'm not -- and I'm not alone in  
14 this. This is the first time I've actually seen this in play.  
15 Right? So the briefing of the parties is really what we had  
16 and our own research -- my law clerks are amazing. We couldn't  
17 even really find a really persuasive -- not persuasive, binding  
18 case. It's all persuasive. The Third Circuit has not squarely  
19 dealt with this.

20 MS. REEVES: You're correct, Your Honor.

21 THE COURT: And so I'm by myself. I'm not afraid of  
22 that, but I say that to say I'm confident where I'm going with  
23 this. And to the extent I'm wrong, someone will tell me.

24 MR. HOFMANN: Well, I'll volunteer, Judge.

25 THE COURT: Yeah, but I think you've done that

1 already. I think you've done that already. And so I should  
2 say someone in a role that is actually going to have  
3 consequences to me will tell me.

4 MS. REEVES: Okay.

5 THE COURT: All right.

6 MS. REEVES: So no further briefing, is that your --

7 THE COURT: Yeah, no further briefing. I think I'm  
8 good on this. I do understand and appreciate your arguments,  
9 but I think they're without consequence.

10 Even if the facts could be discovered, I don't know  
11 that that helps me with my analysis with respect to the  
12 discretionary function. I think that's where the case is  
13 lacking. But again, you know, it won't be the first time that  
14 I understood incorrectly, and so I guess I'll find out if I'm  
15 wrong.

16 So let me start by saying, as it relates to the  
17 government's motion, the Court notes that the government's  
18 jurisdictional challenge rests entirely on the pleadings.  
19 Thus, the government's motion presents a facial attack  
20 constraining the Court to only consider the allegations of the  
21 complaint and the documents referenced therein and attached  
22 thereto in the light most favorable to the claimants.

23 And so query whether or not I even can get to the,  
24 what I'm calling SAR search and rescue policy. But I figured  
25 the workaround. In any event, that proposition is supported by

1 Gould Electronics, Inc. vs. United States, 220 F.3d 169 at 176  
2 (3d Cir. 2000).

3           Claimants invoke two statutes, the Suits in Admiralty  
4 Act, 46 U.S.C. Sections 30901, et seq; and Public Vessels Act,  
5 46 U.S.C. Sections 31101, et seq. Under both of these  
6 statutes, Congress has waived the government's sovereign  
7 immunity, but only to the extent that a civil action in  
8 admiralty could be maintained against a private person. 46  
9 U.S.C. Section 30903. See also *Patentas vs. United States*, 687  
10 F.2d 707 at 715 (3rd Cir. 1982).

11           "Simply stated, this Court's subject-matter  
12 jurisdiction pivots on whether the claims at issue could  
13 hypothetically establish a tort law duty analogously applicable  
14 to similarly-situated private parties."

15           Here, the claimants seek to hold the government liable  
16 for certain alleged failures related to the Coast Guard's  
17 procedures taken prior to undertaking the rescue of the  
18 CONCH'RD; however, it is well-established principle of maritime  
19 law that a private party is not incumbered by any duty to  
20 rescue a person or vessel in distress. *Frank vs. United*  
21 *States*, 250 F.2d 178 at 180, (3d Cir. 1957).

22           Because a private party could not under analogous  
23 facts be liable for the asserted claims, the Court finds that  
24 the government has retained its sovereign immunity in this  
25 case. However, even assuming that the Coast Guard did owe such

1 a duty as claimants allege here, their claims would  
2 nevertheless be barred by reason of sovereign immunity because  
3 they have failed to establish the Coast Guard lacked discretion  
4 in its search and rescue procedures.

5 An exception to sovereign immunity, the law recognizes  
6 that the government may waive its immunity in instances where,  
7 for example, the challenged conduct does not involve an element  
8 of judgment or choice. Stated differently, sovereign immunity  
9 may be waived where either a statute, regulation, or policy  
10 effectively eliminates, effectively eliminates a government  
11 entity's discretionary function by compelling it to follow a  
12 specific course of action.

13 The third-party plaintiff attaches to her opposition  
14 papers the Coast Guard's addendum search and rescue policy,  
15 which purportedly prescribes specific, non-discretionary  
16 actions the Coast Guard must take when responding to maritime  
17 emergencies.

18 Despite having never previously referenced, nor  
19 attached this document to the pleading, I find that plaintiff  
20 ignores the SAR policy's plain language, expressly that its  
21 prescriptions are unconstrained and always subject to the Coast  
22 Guard's discretion. There's a disclaimer that is apparent on  
23 the face of this document and the provisions cited come with  
24 qualifications that suggest discretion to this Court.

25 "Further, numerous courts have found that this very

1 document and its guidance does not circumvent, much less  
2 substitute itself for the judgment and sound discretion of the  
3 Coast Guard." See for example *Matter of Moore*, 488 F. Supp.  
4 231, 239 through 40, District of Maryland, 2020. In that case,  
5 granting motion to dismiss on the basis that discretionary  
6 function exception applied after reviewing the SAR addendum.

7 Also, in *Azille vs. United States*, 2008 Westlaw  
8 4911205, DVI, November 13th, 2008, concluding that "The Coast  
9 Guard's decision to search for plaintiffs and its judgments  
10 about how to conduct the search were discretionary acts."

11 For all of these reasons, the Court finds that the  
12 government is entitled to sovereign immunity based on the  
13 claims in this matter. As such, the government's motion to  
14 dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) is  
15 granted and all claims against it are dismissed with prejudice.

16 All right. Tough stuff. Took me a long time, my  
17 staff a long time to kind of parse this through, but I landed  
18 in my decision where I think this particular case led me.

19 And so with that, the next thing on the agenda is this  
20 motion to amend, motion to amend or second amended complaint,  
21 and there was one opposition on behalf of Revere. However, I'm  
22 going to dismiss that motion to amend as moot now because it  
23 still names the Coast Guard -- or the United States of America.  
24 So I think for all purposes, we need a new amended complaint.

25 In that, though, in saying that -- so motions to amend

1 the complaint are in the province of the magistrate judge in  
2 our district. And so usually they hold off deciding those when  
3 there's a motion to dismiss that impacts the proposed motion to  
4 amend, and so I don't want to be interpreted as stepping into  
5 what we have magistrate judges handle, but there was some  
6 arguments raised by Revere with respect to the wording in the  
7 amended complaint that I trust can be worked out when you file,  
8 I guess, the third amended complaint.

9 And so with that, unless there is an objection to me  
10 rendering, by virtue of this decision, the second motion to  
11 file the second amended complaint as moot, then I will do as  
12 I've indicated and allow the plaintiffs 30, 60 days to file the  
13 next proposed motion to amend.

14 So the only person that can oppose is counsel on  
15 behalf of Revere, or Revere as one of the parties.

16 Any objection to that proposed course of action?

17 MR. NOBLETT: No, Your Honor.

18 THE COURT: So I'll leave that to the two of you.

19 Any objection to that proposed course, rendering the  
20 second amended complaint as moot, giving you leeway to file  
21 another complaint?

22 MS. REEVES: I don't have a dog in this fight, so...

23 MR. HOFMANN: Obviously, I understand the reasoning  
24 because the -- it does -- the second amended or proposed  
25 complaint has the government still in it, so it's got to come

1 out.

2 As to ruling on the change of language, I don't see  
3 why -- well, I guess you're saying that it's moot, but -- I --

4 THE COURT: No, what I'm saying is there's an  
5 objection to it based on Revere, and what I'm suggesting is  
6 that you all work that out before filing the next amended  
7 complaint. I will not be deciding that. That is in the  
8 province of the magistrate judge.

9 MR. HOFMANN: I see what you're saying, Judge.

10 THE COURT: Yeah.

11 MR. HOFMANN: We weren't able to work it out, so we're  
12 just going to have to fight it out.

13 THE COURT: Which is fine, but you're going to fight  
14 that out by virtue of another amended complaint, because the  
15 one that's currently filed is inoperable given my decision with  
16 respect to the Coast Guard.

17 MR. HOFMANN: Understood, Your Honor. We'll have that  
18 filed forthwith so we can move on.

19 We have a conference scheduled in a week from now with  
20 the magistrate judge and we can -- we'll work things out as to  
21 that.

22 But thank you, Your Honor.

23 THE COURT: Yes, that conference is November 8th at  
24 11:00 a.m.

25 MS. REEVES: Yes, Your Honor.

1 THE COURT: Thank you all. Have a great day. Take  
2 care.

3 MS. REEVES: Thank you, Your Honor. You too.

4 MR. PREAMBLE: Thank you.

5 THE COURTROOM DEPUTY: All rise.

6 (Matter adjourned at 1:55 p.m.)  
7

8 - - - - -  
9

10 I certify that the foregoing is a correct transcript  
11 from the record of proceedings in the above-entitled matter.  
12

13 /S/ Sharon Ricci, RMR, CRR  
14 Official Court Reporter

15 November 16, 2022  
16 Date  
17  
18  
19  
20  
21  
22  
23  
24  
25